5/7

A NO 194/84

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY

736

No Special Consideration

BETWEEN MARKHOLM CONSTRUCTION COMPANY LIMITED a duly incorporated company having its registered office at Wellington and carrying on the business of building contractors

First Plaintiff

AND MARK WILLIAM STEPHEN MARKHOLM of 331 Karaka Bay Road, Seatoun, Wellington, Apprentice Carpenter

Second Plaintiff

substantive judgment reported [1985] 2 NZLR

AND THE WELLINGTON CITY COUNCIL a body established under Part II of the Local Government Act 1974 and having its office at Wellington

Defendant

Hearing: 26 June 1984

Counsel: P D McKenzie for Plaintiffs
R A McGechan and R A Kerr for Defendant

Judgment: 27 June 1984

JUDGMENT OF JEFFRIES J

This is an application by the plaintiffs for an interim injunction. It is appropriate to begin with a

little further description about the plaintiffs themselves because that becomes an issue with the defendant Council, as set out hereafter. Markholm Construction Company Limited is the first plaintiff and a building contractor, with the special purpose of conducting a housing construction business. The managing director is Mark Graham Markholm who filed an affidavit on behalf of the company, and is father of the second plaintiff. The second plaintiff still lives with his parents and is an apprentice carpenter employed by the first plaintiff. He is now aged 20 years. The defendant is the territorial local authority, and in addition to that function has been engaged in developing land within the city boundaries for sub-division and sale.

The facts which gave rise to the plaintiffs' request for an interim injunction are now set out. By identical advertisements placed in a daily newspaper circulating in the city the defendant gave notice of its intention to dispose of sections by ballot. Because of the importance of the newspaper advertisement it is now set out in its entirety:-

" WELLINGTON CITY COUNCIL
MAUPUIA
NEW SINGLE-UNIT AND MULTI-UNIT
SECTIONS FOR SALE

Rangitane Street, Cobar Close, Tamahine Street, Waiwera Crescent

Prices range from $15,000 to $25,000

Payment by cash or by a minimum of 25% deposit with the balance payable over a period not exceeding 3 years with interest at 13% per annum.

Cash purchasers will receive a discount of 10% of the sale price provided the balance is paid within one month of the availability of title.

No restriction on building time.

No means test.

Some sites are affected by an electricity easement.

This subdivision will be disposed of by ballot.

Plans, pricelists, Conditions of Sale, and other details are available from the Housing and Property Branch, Second FLoor, Municipal Office Building, Mercer Street (PO Box 2199, Wellington) tel 724-599 ext 777.

Offers to Purchase must be submitted (on the forms provided) to the Housing and Property Branch not later than 12 Noon, Friday, April 13, 1984.

I A McCUTCHEON, Town Clerk."

The advertisements appeared in a daily nespaper on the 24th, 31st of March and 7th of April. Mr Markholm senior, on behalf of his company, and Mr Markholm junior on his own behalf, completed the Council's document

described in the advertisement as "offers to purchase" and lodged it with the City Council on the last day, namely 13 April 1984. The offers to purchase executed by each of the Markholms enabled them to list in order preferences for the various lots available. At the City Council offices they were able to obtain a list of the sections for which a ballot was to be held, and each section had a fixed price within the range of prices referred to in the advertisement. The so-called "offers" were completed by each of the Markholm men together with the price stipulated for by the Council. The next communication received by the plaintiffs from the Council was a letter dated 5 June 1984, and I reproduce the letter addressed to Mr Mark William Stephen Markholm, who is the second plaintiff. That letter states as follows:-

> "Maupuia Subdivision
>
> I am writing to inform you that the ballot for the above subdivision is to take place on 18 June 1984 at 2.00 p.m. in the Concert Chamber.
>
> The Council is only prepared to accept one application from each family or household. Your application therefore has been amalgamated with that of Markholm Construction Co. Ltd under your name. If you wish to change the name on the amalgamated application you may do so by notifying the Council within the next seven (7) days.
>
> You may be interested to know that further sections will become available once the matter of this subdivision has been resolved.

Your ballot number is 97 and you are cordially invited to attend to witness the draw. If there are any enquiries relating to this matter please do not hesitate to contact either myself or Mr C. McNeilly.

Applicants who are successful in the ballot will be required to sign a formal application for their particular section and pay a deposit of not less than 25% of the total purchase price within seven (7) days following the ballot.

Yours faithfully,

E.F. Camplin (signed)
Chief Clerk
Housing & Property Branch"

An identical letter was sent to the first plaintiff except that it was informed its application had been amalgamated with that of Mr Mark William Stephen Markholm under that name. In confirmation of that action the ballot number allotted to the company was the same as to Mr Mark William Stephen Markholm, namely 97.

Apparently neither of the plaintiffs reacted to the Council's proposal to amalgamate their applications until a further letter dated 14 June was received by each of the plaintiffs informing them that the defendant Council at its meeting on Wednesday 13 June 1984 had

decided to cancel the ballot which was to be held on Monday 18 June. No reasons were given to either of the plaintiff applicants for this sudden alteration in the arrangements.

Both plaintiffs consulted a firm of solicitors who wrote to the Council in a letter dated 15 June 1984 alleging that their clients considered that the advertisements published by the Council created a collateral contract between offerors and the Council entitling offerors to take part in the ballot for the purchase of the section. It further alleged that by the cancellation the Council was attempting to refuse to be bound by the terms of that contract and that proceedings would be commenced for specific performance. Simply as a matter of clarification when the case was heard in court counsel for the plaintiffs abandoned the word "collateral", and argued as set out hereafter that there was a contract between each plaintiff and the Council to hold the ballot. As a secondary claim, but ranking almost equal in importance to the plaintiffs' case, and mentioned in the solicitor's letter to the Council dated 15 June, was the purported amalgamation of the two applications after the advertisement, which contained no such suggestion. The plaintiffs' claim, with justification, to amalgamate confuses both separate legal personalities resulting in uncertainty as to who in fact is the applicant.

The plaintiffs duly issued their proceedings which were filed on 19 June alleging the said contract and seeking a permanent injunction, declarations and an order

for specific performance together with a claim for general damages. At the same time plaintiffs filed a motion for an interim injunction restraining the defendant until further notice of this court from readvertising for sale by ballot certain sections at Maupuia on the Miramar Peninsular or taking any further steps toward conducting a sale of the said sections other than pursuant to advertisements seeking applicants for the purchase of the said sections already published by the defendant during March and April 1984.

The City Council filed a statement of defence on 20 June 1984 which simply denied the principal allegations contained in plaintiffs' statement of claim without exploring in any way the issues behind the facts alleged. That document was followed by a very short affidavit from the Assistant Town Clerk sworn and filed on 25 June 1984 which had annexed to it the documents lodged with the City Council by the plaintiffs on 13 April 1984, and referred to above. The affidavit contained an acknowledgement that at the time of the said advertisements it was the intention of the Council to conduct a ballot as so advertised but at no time was it the intention of the Council to bind itself by contract to conduct such ballot.

The motion for an interim injunction was set down for hearing on 26 June 1984. Before argument proper commenced the court felt bound to ask counsel for the defendant why more information had not been placed before the court by way of explanation of the apparently capricious conduct of the Council in amalgamating two applicants without notice that was a possibility, and on

what basis they chose to class the two plaintiffs, who at law are distinct legal entities, as part of a "family or household". It was further drawn to counsel's attention that the affidavit filed for the purposes of a hearing of the application for an interim injunction did not offer any explanation whatsoever of the Council's sudden decision to cancel the ballot, or any other material facts concerned with the exercise of the court's discretion whether or not to grant an interim injunction. This seemed then to the court, and still does, to be a matter of considerable importance in arriving at a decision under the balance of convenience, if that had to be reached. I offered to both counsel an adjournment of the hearing for 24 hours to enable this information to be placed before the court but it was declined. Both counsel agreed, however, the hearing could continue on the first limb of the application for an interim injunction, namely whether the threshhold of a serious question to be tried had been passed by the plaintiffs. The final result of these procedural matters is that the court hereafter gives its decision on the threshhold question, and the second limb of the aplication for an interim injunction, namely the balance of convenience has been adjourned for a further hearing and both parties have been given leave to file affidavits on this issue.

It is convenient now to mention that Mr McGechan advised the court from the Bar that the reasons for the cancellation of the ballot were two-fold, namely:-

1. It appeared to the Council that applications were coming in from groups of persons applying

for one section and thus increasing their chances within the group of obtaining that section. Also, the Council observed that groups of persons were applying for numerous sections with a view to obtaining adjoining or abutting sections.

2. The Council became concerned lest it might have offered public property at less than proper prices.

The starting point on the modern law is American Cyanamid Co. v Ethicon Limited [1975] A.C. 396. In New Zealand the Court of Appeal has adopted American Cyanamid. See Consolidated Traders Ltd v Downes and Francis [1981] 2 NZLR 247 at 255. The principles are contained in Fellowes & Son v Fisher [1976] Q.B. 122 at 140-141 and Garden Cottage Foods Ltd v Milk Marketing Board [1983] 3 W.L.R. 143. There are two issues to be examined:-

1. Is there a serious question to be tried?

2. Where does the balance of convenience lie?

I risk repeating myself in saying this part of the judgment decides only the "serious question to be tried" issue on the basis that it is usually dealt with in an application for an interim injunction, and not as a substantive issue before the court. In other words I, or any other judge before whom the action of the plaintiffs might be called, will be free to treat this decision as

one in which the court held the case of the plaintiffs was arguable, but no more.

The decision is to hold that the plaintiffs do have a serious question to be tried. It is now clear that conclusion does not involve deciding on "probability" or "prima facie case" or "strong prima facie case". See Eng. Mee Young v Letchumanan [1080] A.C. 331. Stating the conclusion at this point of the judgment enables me to say that the issue of the right of the Council to amalgamate applications in the manner it did can be postponed until the substantive hearing allowing this judgment to look at the effect in law of the advertisement and applications of the plaintiffs.

From the advertisement of the Council can be extracted the following relevant points:-

1. The subdivision at Maupuia was completed and the sections were ready to go to the public immediately.

2. The prices for each section had been fixed in the range $15,000-$25,000.

3. Terms were offered for those who wished them but a counterbalancing substantial reduction in purchase price of 10% was offered for cash within one month of the availability of title.

4. It seems the Council by mention of no restriction on building time and no means test

meant to convey that notwithstanding it was a public body it did not intend to impose restrictions which had not been unknown in the past. It seemed it wished to rank itself as a straight, commercial developer.

5. There was an unequivocal statement that the sections would be disposed of by ballot which indicated it clearly expected more applications than sections. It seemed to understand the market response would be extremely favourable which conflicts, to an extent, with the "commercial developer" image.

6. It does say "Offers to Purchase etc." are to be submitted, but that may be capable of more than one interpretation and is not necessarily conclusive.

7. The public were invited to attend the Council to examine plans, price lists, conditions of sale etc.

It is to be recalled the plaintiffs completed the "Offers to Purchase" forms in time and each gave an extensive list of preferences using the Council's stipulated prices. Details of how the ballot was to be conducted are not known. The Council by letter dated 5 June 1984, nearly 8 weeks after closing date, which gave it ample time to consider its position, advised the plaintiffs of the date of the ballot, then less than two weeks away. Between that letter and 13 June it changed

its mind for reasons now disclosed by its counsel from the Bar.

Counsel's argument to overcome the threshhold test was advanced in the alternative. First, he submitted that there exists a contract between the defendant Council and the plaintiffs as applicants that Council will conduct a ballot for sale of sections on stated terms and conditions of advertisement. His submission was the offer was made by Council in its advertisement and accepted by plaintiffs who completed applications in prescribed forms. This contract is a unilateral contract of the kind described in Carlill v Carbolic Smoke Ball Company (1893) 1 Q.B. 256, 268-269, and the reward cases. See Chitty on Contracts, Volume 1 (25th edn), para 48. In this particular instance there are no further terms to negotiate, or discuss, and the advertisement of the Council was a clear statement of its intention to be legally bound, it was submitted. On completion of the application no further step had to be taken by any applicants. All applicants were in an equal position to every other in the ballot. In that regard the ballot is unlike an auction or tender. As an illustration of the principle for which he contended Mr McKenzie said some analogy with the present facts could be obtained from the auction cases "without reserve" but this case was stronger. See Warlow v Harrison (1950) 29 LJQB 14; Harris v Nickerson (1873) LR8 Q.B. 286 and articles in 1952 68 Law Quarterly Review.

Mr McKenzie submitted the court should exercise caution against applying too rigidly the categories of offer, acceptance and consideration to the facts before it

where the relations of the parties are of a commercial character entered into for business reasons of ultimate profit, see New Zealand Shipping Company Limited v A.M. Satterthwaite & Company Limited [1974] 1 NZLR 505 at 510 J.C. and Boulder Consolidated Limited v Tangaere [1980] 1 NZLR 560 at 562-563 C.A. On the intention to create legal relations see Esso Petroleum Limited v Commissioners of Customs and Excise [1976] 1 All E.R. 117 H.L.

Mr McKenzie submitted that with the applications lodged his clients, as applicants, were bound contractually to leave their applications with the Council and to take their chance in the ballot which, he said, would result in a ripening into another contract, being one for sale and purchase between the applicant and the Council at the moment of the drawing of the plaintiffs' number at the ballot.

The alternative argument of Mr McKenzie was that the advertisement constituted an invitation to treat whereby the Council sought a pool of offerors who would go into the ballot for its sections. Under this heading he submitted each application constituted an offer to participate in the ballot which was accepted by the Council when it notified by letter dated 5 June 1984 the date and time of the ballot and the ballot number of that application. With that he submitted the Council is then bound to hold the ballot in accordance with advertised conditions.

The short answer of the defendant to the foregoing submissions was that the advertisement was not, and never

could be interpreted, as an offer and Mr McGechan pointed to the use of the word "offeror" in the advertisement in support of that submission. He further submitted that there was never any intention on the part of the Council to enter legal relations stemming from the advertisement, but he also agreed the test is an objective one.

Both counsel agreed that there have been no decided cases their researchs could uncover concerning a ballot as there are with say, auction, and reward cases. Already the court has said enough of a cautionary nature to indicate it is not disclosing its own final view on the law other than to determine the case is arguable enough to find that the plaintiffs have satisfied the threshhold test and the court may now proceed to the issue of balance of convenience. At the court's request when the decision was reserved yesterday, anticipating this possible result, Mr McGechan gave an undertaking that the Council would take no steps to the detriment of the plaintiffs before the final limb of the application had been decided and with it whether an interim injunction should issue.

The hearing is adjourned to be brought on for an early fixture, and both parties are reserved the right to approach the court for further orders should it be necessary.

Solicitors for Plaintiffs: Brandons, Wellington

Solicitor for Defendant: The City Solicitor, Wellington